

THE DOCTRINE OF IMPLIED REVOCATION OF WILLS BY REASON OF CHANGE IN DOMESTIC RELATIONS OF THE TESTATOR*

A. THE HISTORY AND DEVELOPMENT OF THE DOCTRINE— ITS SOURCE AND GROWTH

Where it is unaltered by statute, the Anglo-American common law enunciates two well-defined testamentary rules which declare as revoked a will made by a testator who, subsequent to the making of the will, has undergone certain changes in domestic relations. The source and history of the growth of these two rules is intensely interesting, and an attempt will be made here to briefly outline such source and history in order to lay the proper foundation upon which to discuss this doctrine of implied revocation as it exists today under modern statutes.

These two rules, *viz*: (1) that marriage plus the birth of issue revoked a prior will in the case of a male testator¹ and (2) that marriage alone revoked a prior will in the case of female testatrix,² have frequently been spoken of as "the doctrine" of implied revocation by reason of a change in domestic relations of the testator.³ Though these rules might be referred to more properly as "applications" of this doctrine rather than as "the doctrine" itself,⁴ it is nevertheless true that they set forth in general the only changes in domestic relations which would at common law work an implied revoca-

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¹ *Brown v. Thompson*, 1 Eq. Cas. Abr. 413, Pl. 15; *Eyre v. Eyre*, 1 P. Wms. 304, note; *Christopher v. Christopher*, Dick. 445; *Brady v. Cubitt*, Dough. 31; *Gibbons v. Caunt*, 4 Ves. 840; *Lugg v. Lugg*, 2 Salk. 592; *Ex parte Ilchester*, 7 Ves. 348; and for further cases see 30 Am. and Eng. Enc., 650 n. 7, and 40 Cyc. 1198, n. 99. But see *Overbury v. Overbury*, 2 Show. 242; *Johnston v. Johnston*, 1 Phillim. 447 and discussion *infra*.

² *Forse v. Hembling's Case*, 4 Co. Rep. 60; *Hodsdon v. Lloyd*, 2 Bro. Ch. 534; *Doe v. Staple*, 2 D. and E. 684; *Long v. Aldred*, 3 Add. Ecc. 48 (*obiter*); 1 Jarmar on WILLS 122; and *Gouldsborough*, 109 Pl. 16.

³ See for example 1 Williams on EXECUTORS, (8th ed.) p. 190 *et. seq.*

⁴ See 1 Page on WILLS, (2d ed.) p. 768, and discussion, *infra*.

tion of a will. Neither marriage of a male testator alone,⁵ nor birth of issue alone⁶ was held to work an implied revocation.

The source of these two familiar rules of the common law, has frequently been attributed to the Roman law.⁷ Cicero in his *De Oratore* wrote: "For who is it that would seek to inherit under this will which the father of the family made before his son was born? Nobody; because it is agreed that a will is broken through lack of knowledge."⁸ The rule having to do with male testators does probably have its roots in this doctrine of the Roman law, though it is at its best a hybrid sort of outgrowth; for while at Roman law birth of issue to a testator was alone sufficient to revoke his will, at English common and ecclesiastical law the cases required both marriage and birth of issue. As was pointed out by Sir Hay in *Sheperd v. Sheperd*,⁹ this distinction between the Roman and the common law arises from the fact that, "In the former, the children are considered as having a property in the effects of the father. In our law we know of no such thing; and therefore the effect of the birth of children must be different."

The rule having to do with the female testatrix does not seem to have come from the Roman law, however; for if we can take the word of such authorities as Williams, Blackstone, and Redfield, a married woman at Roman law possessed the same testamentary capacity in all respects as a *feme sole* and it would seem to follow that marriage of a Roman woman had no effect upon her prior will.¹⁰ At common law, on the other hand, a *feme sole* who married, ordinarily lost the capacity to make a new will or to change a prior will. Therefore to say that the will of a *feme sole* was to remain in effect in spite of her subsequent marriage would deprive the will of its ambulatory na-

⁵ *Wellington v. Wellington*, 4 Burr. 2165; *Jackson v. Hurlock*, Amb. 494 (*obiter*); *Doe v. Burford*, 4 M. and S. 10 (*obiter*); and for further cases see 30 Am. and Eng. Enc., 649 and 40 Cyc. 1204, n. 30.

⁶ *Doe v. Barford*, 4 M. and S. 10; *Sherry v. Lozier*, 1 Bradf. 347; *Bloomer v. Bloomer*, 2 Bradf. 345.

⁷ *Johnston v. Johnston*, 1 Phillim. 447; *Sutton v. Hancock*, 115 Ga. 857, 42 S.E. 214; *McCullum v. McKenzie*, 26 Iowa, 510.

⁸ "Num quis eo testamento quod paterfamilias ante fecit quam ei filius natus est, hereditatem petit? Nemo: quia constat agnascendo rumpi testamentum." DE ORATORE, lib. 1.

⁹ 5 T.R. 51.

¹⁰ 1 Williams on EXECUTORS (8th ed.) 47; 2 Blackstone's COMMENTARIES, 497; Redfield on WILLS, 23.

ture, that characteristic of a will which the courts of our legal system have always held to be so essential.¹¹ That the rule of implied revocation of the will of a *feme sole* by her marriage is native to our law would seem to be further substantiated by the fact that the earliest case laying down this rule, *Forse v. Hembling's Case*,¹² decided in 1590, as reported in Coke, says nothing at all of the Roman law. Coke says merely: "It was [here] adjudged on great deliberation, that the taking of a husband [by a woman], and the coverture at the time of her death, was a countermand of the will." Swinburne writing about twenty-one years later also states the rule without mention of the Roman law.¹³

Swinburne also discredited the existence in English law of any such rule as that of the Roman law with the words: "Albeit the testator after the making of the testament, have a child born unto him, I suppose that the testament is not presumed thereby to be revoked, especially if the testator live a long time after the birth of the child, and might have revoked the testament and did not."¹⁴ Swinburne's assumption was, however, apparently discredited by the case of *Overbury v. Overbury*¹⁵ (1682), usually cited as the first case which introduced the male testator rule into our law. The report of this case as it appears in 2 Shower at page 242 reads: "Upon an appeal before sentence to the Delegates, it was adjudged, that if a man make his will and dispose of his personal estate amongst his relations, and afterwards has children and dies, that this is a revocation of his will, according to the notion of the civilians, this being an *inofficiosum testamentum*." In this report it is to be observed that there is no mention of subsequent marriage as being an ingredient of the rule, but the authorities say that upon looking into the original proceed-

¹¹ Swinburne puts it in this wise: "... albeit the Testament be made before the marriage, yet, she being intestable at the time of her death, by reason her husband is then living, the Testament is void; for it is necessary to the validity of a Testament that the testator have ability to make a testament, not only at the time of the making thereof, when the Testament receiveth his essence or being, but also at the time of the Testator's death, when the Testament receiveth his strength and confirmation."—pt. 2, IX.

¹² 4 Co. Rep. 60, 61.

¹³ Swinburne, pt. 2, IX. See note 11, *supra*.

¹⁴ Swinburne, pt. 7, sec. 16, pl. 3.

¹⁵ 2 Show. 242.

ings, it appears that in fact the marriage occurred after the will in question was made.¹⁶ The report shows, however, that the lawyers of the time did not consider marriage a material circumstance; for it is not even referred to.¹⁷ *Overbury v. Overbury* was followed by the case *Lugg v. Lugg*¹⁸ (1700), where again, though both marriage and birth of issue occurred after the making of the will, the court without reference specifically to the marriage, as being one of the essential features, held that the will was revoked. Nevertheless, the later cases seizing upon the factual circumstances of these early cases rather than upon the broad rules which they lay down, refused to follow the Roman law completely and held that birth of issue alone was not sufficient to revoke the testator's will.¹⁹ This was probably done on the grounds of social expediency, and because of the feeling of the courts that a doctrine applicable to a Roman father, whose children had an actual interest in his property even before his death would only serve to work a hardship if applied to an English father whose children had no such interest.²⁰

The rule of implied revocation having to do with the marriage of a *feme sole* was apparently from the outset looked upon as being applicable to both personalty and realty; and in fact *Forse v. Hembling's Case* which first enunciated it was a real property action decided by the Court of Common Pleas.²¹ The rule having to do with the male testator on the other hand, because it originated in the ecclesiastical courts of England, dealt at first only with personalty,²² and even after it was taken over by the common-law courts it was for some

¹⁶ *Johnston v. Johnston*, 1 Phillim. 447. "Upon looking into the original proceedings I find that the marriage was also subsequent to the will; but the report shows it was not understood by the lawyers of that day that marriage was a material circumstance; for so far from its being considered a material circumstance, it is not even adverted to in the report."—at page 479. See also 1 Williams on EXECUTORS (8th ed.), 194.

¹⁷ See n. 16, *supra*.

¹⁸ 2 Salk 592, 1 Ld. Raym. 441.

¹⁹ See note 6, *supra*, and *Shepherd v. Shepherd*, 5 T.R. 51, where Sir Hay says: "But however well established this maxim [that birth of issue alone would by implication revoke a will] may be, [at Roman law] and worthy of the attention of a legislator and politician, yet it must yield to the positive laws of society, particularly in a country of freedom like this, otherwise to benefit one, all might be injured; *misera servitus ubi jus vagum*."—at page 52.

²⁰ See discussion, *supra*, and *Shepherd v. Shepherd*, 5 T.R. 51 at p. 55.

²¹ 4 Co. Rep. 60.

²² *Overbury v. Overbury*, 2 Show. 242 and *Lugg v. Lugg*, 2 Salk. 592, 1 Ld. Raym. 441.

time looked upon as applying only to this type of property.²³ Equity, however, seemed willing enough from the outset to apply the rule to land as well as to personalty.²⁴ These earlier cases, decided by the common-law courts, which refused to extend to land the rule that the ecclesiastical courts had foisted upon them, had every proper and tenable grounds for such refusal; for it is to be remembered that the statute of frauds providing, "... all devises and bequests of lands and tenements shall remain and continue in force, until the same shall be burnt, cancelled, torn or obliterated by the testator, or his directions, in the manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing, of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding."²⁵ was then in force. In spite of the strong words of this statute, however, Lord Mansfield ignored them completely when in 1768 in the case of *Wellington v. Wellington*²⁶ he glibly said: "I see no ground of argument why the law should not be the same as to the devises of land."

The case of *Christopher v. Christopher*²⁷ in 1771 finally settled the law that this male testator rule was to apply to land as well as to personalty. The court in that case, far from following Lord Mansfield's lead and ignoring the statute of frauds, used the very words of the statute that apparently seemed to bar its way and by an interesting process of judicial reasoning arrived at a result which the statute on its face was passed to prevent.

The doctrine of implied revocation in our law has now been traced through its infant and swaddling clothes stages and it is wise, before going further, to inquire just what the basis of this doctrine is, and whether it is broader than its two general common-law restrictions above outlined. Kent said:

²³ *Driver v. Standring*, 2 Wils. 90; *Parsons v. Lanoe*, 1 Ves. Sen. 191, 1 Wils. 243, Ambl. 557 (obiter); *Jackson v. Hurlock*, Ambl. 487.

²⁴ *Brown v. Thompson*, 8 Dec. 1701 (obiter).

²⁵ 29 Car. II c. 3, sec. 6.

²⁶ 4 Burr. 2165.

²⁷ Dick. 445, 21 Eng. Reprint 343. See also *Spraage v. Stone*, Ambl. 721, (1773).

"Implied revocations are founded upon the reasonable presumption of an alteration of the testator's mind, arising from conditions since the will, producing a change in his previous obligations and duties. . . ."²⁸

If it is granted that Chancellor Kent announces the proper foundation of the doctrine, it is an easy matter to say that the doctrine is not limited in its application to its two precise common-law restrictions above outlined, and that there was " . . . a general principle to the effect that any change in domestic relations would operate as a revocation if the new duties which arose were such as to justify the courts in holding that the prior will could not be in effect, in view of such new duties, . . . [and that] the restriction of this doctrine to the marriage of a woman or the marriage of a man and birth of a child [was] due to the fact that these were the only changes in domestic relations which, under the rules of the then existing law of descent and distribution, could have this effect".²⁹ This is, however, by no means a universal view and many courts in absence of statute refuse to apply the doctrine of implied revocation from change in domestic relations to any situation where the changes in such relation are not precisely those required under the earlier common law.³⁰

The view which a given court will take on this proposition becomes important today in at least two instances to be discussed in subsequent sections. The first of these is the divorce situation, where the testator, while married, makes a will in which he provides for his wife and subsequently a divorce and property settlement between the two is consummated. Does this work a revocation of testator's will? The second situation is one arising, when in a jurisdiction which has a statute making the wife the heir of her husband, a man makes a will and then marries. Does marriage under these circumstances constitute such a change in the husband's previous obligations and duties as to raise a reasonable presumption of an alteration of

²⁸ 4 Kent COMM. 521. He continues: ". . . there is not, perhaps, any code of civilized jurisprudence in which this doctrine of implied revocation does not exist, and apply when the occurrence of new social relations and moral duties raises a necessary presumption of a change of intention in the testator."

²⁹ 1 Page on WILLS, (2d ed.) sec. 473.

³⁰ 1 Page on WILLS, (2d ed.) sec. 473, n. 2.

the testator's mind and work an implied revocation of the will? The answer of a given court will depend upon the view it takes of the doctrine of implied revocation. Is it stereotyped and inflexible or is it elastic enough to meet the new changes in domestic relations brought about by the development and growth of the substantive law?

B. THE DEVELOPMENT OF THE DOCTRINE CONTINUED
WITH SPECIAL REFERENCE TO THE TYPE OF PRESUMP-
TION CREATED BY THE REQUISITE CHANGE IN DOMESTIC
RELATIONS

The ecclesiastical courts which, it will be remembered, originated the rule that marriage and the birth of issue would revoke the prior will of a man, took the view that the revocation was grounded on the *implied intention* of the testator to revoke his will under the new circumstances. Therefore they held that parol evidence showing that the *actual intention* was really contrary to the one *implied* from the change in the circumstances was admissible to defeat a revocation of the will.³¹ Lord Mansfield with his customary abandon adopted this rather suspicious looking ecclesiastical rule without question in the common-law case of *Brady v. Cubitt*,³² where he says: "A subsequent marriage and the birth of a child affords a mere presumption." Lord Buller "entirely concurred" in this view. This was in 1778. By 1795, however, Buller had entirely changed his attitude in this regard and said: "I therefore think that this is a *presumptio juris et de jure*, and that the case must stand or fall by the rule of law, without being explained by parol evidence."³³ Lord Buller's change of heart was characteristic of the change of all of the common-law courts, influenced as they were by the statute of frauds. They then adopted what continues as the modern view, that the revocation was the consequence of an inflexible rule of law or of

³¹ *Fox v. Marston*, 1 Curt. Eccl. 4946 *Johnson v. Wells*, 2 Hagg. Eccl. 561; *Hollaway v. Clarke*, 1 Phill. Eccl. 339; *Emerson v. Bouville*, 1 Phill. Eccl. 343; *Talbot v. Talbot*, 1 Hagg. Eccl. 705.

³² Dougl. 31, (1778).

³³ *Goodlittle v. Otway*, 2 H. Bl. 516. See also *Lancashire v. Lancashire*, 5 T.R. 49 decided in 1792 where Buller had already altered his views.

a condition tacitly annexed by law to the execution of a will and that the operation of this rule was entirely independent of any intention on the part of the testator.³⁴ The ecclesiastical courts continued to hold the presumption of revocation to be a rebuttable one as late as 1829,³⁵ and in this they were followed by a few early American cases.³⁶ However, by 1839 the ecclesiastical courts were dutifully following the lead of the common-law decisions and holding that "it [the doctrine] is to be considered a tacit condition annexed to the will, that at the time of the making of the will it should not have any effect, provided the deceased had a wife and child of the marriage subsequently born."³⁷ Today, this latter view has been adopted by the great weight of American authority.³⁸ In conclusion it might be stated that the will of a woman was *ipso facto* revoked by her marriage, and that the problem of whether a rebuttable presumption arose or not by such change in circumstances did not arise.³⁹

C. SPECIFIC PROBLEMS OF IMPLIED REVOCATION WHICH AROSE AT COMMON LAW AND THEIR APPARENT SOLUTIONS FROM THE CASES

1. Was the doctrine ever applied where testator had not disposed of his entire estate by will? Apparently the doctrine was applied only where the testator had disposed of his entire estate, for where he left undisposed property which could pass to the after-born child, there was no reason for declaring a revocation provided the child got his full intestate share.⁴⁰

2. Was the doctrine ever applied where the after-born child was posthumous? The case of *Lancashire v. Lanca-*

³⁴ *Lancashire v. Lancashire*, *supra*, n. 33 and *Marston v. Roe*, 8 Ad. and El. 14.

³⁵ *Johnson v. Wells*, 2 Hagg. Eccl. 56.

³⁶ *Havens v. Van den Burgh*, 1 Den. (N.Y.) 27; *Brush v. Wilkins*, 4 Johns. Ch.(N.Y.) 506; *Müller v. Phillips*, 9 R.I. 141, (Unusual case which applies rebuttable presumption rule to marriage of a *feme sole*); and *Yerby v. Yerby*, 7 Va. (3 Call.) 289.

³⁷ *Israel v. Rodon*, 2 Moore P.C. 51; *Matson v. Magrath*, 1 Rob. Eccl. 680, (Where the court went so far as to hold that a will even though made in contemplation of marriage, was revoked on the "tacit condition" grounds); and *Walker v. Walker*, 2 Curt. 854.

³⁸ See 1 Page on WILLS, (2d ed.) sec. 474, note 11 on cases there cited.

³⁹ 1 Page on WILLS, (2d ed.) sec. 481.

⁴⁰ 1 Williams on EXECUTORS, (8th ed.) p. 202; *Doe v. Edlin*, 8 Ad. and El. 582; *Marston v. Roe*, 8 Ad. and El. 14 (obiter); and *Brady v. Cubitt*, Dougl. 31.

shire,⁴¹ reverting to the Roman law for authority, in 1790 specifically and clearly held that the rule having to do with the male testator was to apply in the case of posthumous children just as in the case of children born subsequent to the will but in the lifetime of the testator. There is apparently no prior or subsequent case holding contrary, and the law on this point has been settled ever since the *Lancashire* case. It holds good under modern statute, even though the statute uses only the general phrase "after-born children".⁴²

3. Was provision by will or in other writing for (1) the wife alone or (2) for after-born children alone, enough to prevent the operation of the doctrine? The case of *Marston v. Roe*⁴³ in 1838 clearly held that a provision for the future wife only and not for after-born children did not prevent revocation by subsequent marriage and birth of issue, and this was apparently a reasonable enough rule, for in any case revocation of a will by implication after marriage and birth of issue could only be of benefit to such issue and not to the wife, inasmuch as they alone would thereby become entitled to their intestate share. On the other hand it has been held that where the will disposed of the entire estate and the testator subsequently acquired property which would not pass by the will, but would descend to his child, this would not prevent a revocation.⁴⁴ Since it was the after-born issue which the application of the male-testator rule of implied revocation would benefit, it would seem to follow that provision by the testator for such prospective issue in the will or by marriage settlement should prevent the revocation of the will, for where is the "reasonable presumption of an alteration of the testator's mind" under such circumstances? This has been the view adopted by the courts.⁴⁵

⁴¹ 5 T.R. 49.

⁴² *Belton v. Sumner*, 31 Fla. 139, 12 So. 371; *Warner v. Beach*, 4 Gray (Mass.) 162.

⁴³ 8 Ad. and El. 14.

⁴⁴ 1 Page on WILLS, (2d ed.), sec. 480; *Marston v. Roe*, 8 Ad. and El. 14 (obiter); and *Baldwin v. Spriggs*, 65 Md. 373, 5 Atl. 295.

⁴⁵ (1) Where provided for in the will, *Ex parte Ilchester*, 7 Ves. Jr. 348; and (2) Where provided for by marriage settlement, 1 Williams on EXECUTORS, (8th ed.) p. 202, where he says, "The rule of implied revocation was applied only in cases where the wife and children, the new objects of duty were wholly unprovided for." Also *Kenebel v. Scrafton*, 2 Ea. 530; and *Jackson v. Hurlock*, Ambli. 487, 2 Eden 263.

4. If the after-born child at common law died before the testator, did the will stand revoked nevertheless? By the Roman law, if a will was revoked by the birth of a child, the death of that child before the testator did not restore the will.⁴⁶ A similar rule seems to have become settled in our law, and Williams quotes the law on the point as follows: "If a man, after making his will, married and had a child, the subsequent death of the child would not have revived the will, without some act or recognition showing the testator's intention that it should take effect."⁴⁷ One of the cases cited by Williams in support of this rule is that of *Wright v. Netherwood*.⁴⁸ In this case A made a will leaving some legacies and appointing his wife residuary legatee; she died, leaving several children. He married again, and had one child by his second wife. Afterwards, A with his wife and *all* his children perished by shipwreck. It was held that the will was not revoked, the court saying: "As there were neither wife or children at the death of the testator, I am clearly of opinion that the Court ought to pronounce for the validity of the will." This case, then, far from being an authority for Williams' rule, in reality says that if the objects of the testator's duty are not in existence at the time of the testator's death or die simultaneously with him, the will is not revoked even though the prerequisites of marriage plus birth of issue subsequent to the making of the will have taken place. However, since no stronger authority than this single, rather weak case has been found, Williams' statement of the common-law rule in this regard, reiterating as it does the Roman law, is assumed to be correct.

5. Is there any authority at common law expressly holding that birth of issue alone revokes a prior will? As was pointed out above, the first cases on the subject of implied revocation as to male testators (those of *Overbury v. Overbury* and *Lugg v. Lugg*, *supra*) laid no stress upon subsequent

⁴⁶ Editor in note to *Wright v. Netherwood* reported in 2 Salk. 593.

⁴⁷ 1 Williams on Executors, (8th ed.) p. 200. Citing *Emerson v. Boville*, 1 Phillim. 342; *Wright v. Sarmuda*, (also known as *Wright v. Netherwood*), 2 Phillim. 266; and *Braddyll v. Jehen*, 2 Cas. temp. Lee, 193.

⁴⁸ Williams entitles it, *Wright v. Sarmuda*, 2 Phillim. 266, but it is the same case as *Wright v. Netherwood*, 2 Salk. 593.

marriage as being an essential condition to the implied revocation of a man's will just so long as he had issue born after the will was made. The ecclesiastical case of *Johnson v. Johnson*,⁴⁹ decided in 1817, seized upon this fact, and even after the rule that both marriage and birth of issue were required had been definitely established at common law,⁵⁰ held, after a learned review of the authorities, that where birth of children was combined with other circumstances, (great increase in testator's estate, his oral utterances, etc.), a will made after marriage of the testator was revoked. The court says: "The birth of children, after making a will by a married man, may have imposed as strong a moral duty upon him, forming the ground-work of *presumed* intention and may be accompanied by circumstances, furnishing as indisputable proof of *real* intention, as if the Will had been made previous to the marriage."⁵¹ There is, however, apparently no clear-cut case decided either in the ecclesiastical or common-law courts where it was held that birth of issue unaccompanied by any other circumstances revoked a will by implication. It is difficult to see upon reason just why the common-law courts should have been so persistent in requiring both marriage and birth of issue, for, as above pointed out, the after-born issue alone and not the wife were affected by a revocation. The strict rule has been in one way or another altered in every state in the Union by statute as will be pointed out, *infra*.

6. Were there any exceptions to the rule that marriage of a *feme sole* revoked her prior will? "Since a married woman could always execute a power conferred upon her, even if such power were executed by will, her marriage did not revoke a will made to execute a power."⁵² In the Wisconsin case of *Will of Ward*,⁵³ the court points out what it considers an additional exception to the *feme sole* rule, *viz*: that a will was not revoked by her marriage where her power of disposing of

⁴⁹ 1 Phillim. 447.

⁵⁰ See *Lancashire v. Lancashire*, 5 T.R. 49; *Goodlittle v. Otway*, 2 H. Bl. 516; and *Brady v. Cubitt*, Dougl. 40.

⁵¹ At page 474.

⁵² 1 Page on WILLS (2d ed.) sec. 485, p. 784 and cases cited in note 1.

⁵³ 70 Wis. 251.

her separate property after marriage was preserved by an antenuptial agreement; and says: "The power which at common law might be preserved to a married woman by marriage settlement to dispose of her property during coverture, has been expressly preserved to married women in this state by statute."⁵⁴ On this basis the court found that the common-law rule that marriage of a *feme sole* revoked her prior will no longer exists in Wisconsin. It cites some ten or eleven cases to substantiate its statement that this exception existed at common law, but upon checking the same it was discovered that none of them bear out the court's contention; for they are cases where the woman's will was made after, rather than before, marriage. On the other hand we have the strong case of *Hodsden v. Lloyd*⁵⁵ holding directly contrary to the Wisconsin court's contention. In that case a woman being about to marry entered into an agreement with her future husband by which her property was settled on the survivor for life, with power in the wife to dispose of the same by will, after and during marriage. She then immediately made a will, by which she gave her property to the intended husband and afterwards on the same day married him. The court held that the will was nevertheless revoked.⁵⁶ Sugden in his work on POWERS puts the true rule as follows: "But where the agreement is, that the wife may dispose of the estate by will, a will made before marriage, although subsequently to the agreement, will be revoked by the marriage, *unless expressly authorized by the articles to be made before marriage . . .*"⁵⁷ This would seem to be as far as it is possible in this regard to state an exception to the common-law rule that the marriage of a *feme sole* revoked her will.

7. If a woman survived her husband, would that revive a will made before her marriage? The earliest authorities, *i.e.*, *Forse v. Hembling's Case* and *Swineburne*, quite clearly re-

⁵⁴ At page 256.

⁵⁵ 2 Brown, 534.

⁵⁶ *George v. —*, Ambl. 627 and *Doe v. Staple*, 2 T.R. 695 are apparently similar cases. See also 2 Roper on HUSBAND AND WIFE p. 69 and 1 Sugden on POWERS, (6th ed.) p. 349.

⁵⁷ (6th ed.) Vol. 1, p. 194. Italics writers'.

quired that the marriage relationship must continue until the death of the testatrix in order to work a revocation,⁵⁸ and in this they followed the Roman law.⁵⁹ The later cases, however, apparently settled the law to the effect that the survival of the wife had no effect and the will stood revoked nevertheless.⁶⁰

8. If a testator before his second marriage made a will having at that time at least one male child by his first marriage, and then married a second time and had children, did these changes in domestic relations revoke his will? One might expect to find that the courts distinguished between personalty and realty in arriving at their answers to this problem; for it is clear that where a will disposed of real estate alone, the only one who could possibly benefit by a revocation of the will was the testator's heir at law, that is, the son by his first marriage. The children of the second marriage could gain nothing by the revocation of such a will, and the courts might well say that no revocation was worked. On the other hand if the will disposed of personalty only, the children of the second marriage as next of kin would benefit by a revocation. In the case of such a will the courts might apply the ordinary rule that marriage plus the birth of issue revokes a will. That these were the two views taken by (1) the common-law and equity courts dealing with the land passing by will and (2) by the ecclesiastical courts dealing with personalty passing by will, is well illustrated by the case of *Sheath v. York*.⁶¹ In that case the testator, a widower having a son and two daughters, by will gave his real and personal estates in trust to these children. Later he married a second time and had issue, a

⁵⁸ See notes 12 and 13. Since the earlier sections of this paper were written, it has come to our attention that Serg. Manwood writing about 1575, some fifteen years before *Forse v. Hembling's Case*, in dicta expressed the law as did Coke and Swinburne after him. He says: "For if a feme sole makes her will the 1st day of May, and gives land thereby, and afterwards the 10th day of May she takes Husband, who dies the 20th day of May, and afterwards the woman dies the 30th day of May, the Devise is good, and yet if it should be considered according to the Time of the Date, the will would be countermanded by the Espowsals, but it is not so, for it does not take effect until after her Death, at which Time she was discovered as she was at the time of making the will, and the Intermarriage shall not countermand that which was of no Effect in her Life-time." *Brett v. Rigden*, 1 Plowd. 343.

⁵⁹ Swinburne, part 2, sec. 9 on GODOLPH. OPH. LEG. 29.

⁶⁰ *Doe v. Staple*, 2 T.R. 684, 100 Eng. Reprints 368 (obiter); *Cotter v. Layer*, 2 P.Wms. 623 (obiter); *Hodsdon v. Lloyd*, 2 Br. C.C. 534; *Lewis's Case*, 4 Burn. Eccl. Law 647; and 1 Jarman on WILLS (Eng. ed. 1861) 114.

⁶¹ 1 Ves. and B. 390. See also *Ex Parte Ilchester*, 7 Ves. 348.

daughter. The Court of Chancery in determining that the will was not revoked in respect to the land which passed by it said: "Upon no rational Principle therefore can this Testator be supposed to have intended to revoke his Will on account of the Birth of other Children, those Children not deriving any Benefit whatsoever from the Revocation; . . ." ⁶² The ecclesiastical court had, however, decided that this same will was revoked as to the personal estate which was mentioned in it. ⁶³

D. MODERN STATUTES AFFECTING DOCTRINE OF IMPLIED REVOCATION

After this discussion of the doctrine of implied revocation of wills by reason of a change in domestic relations from the common-law point of view, the general question arises, whether these common-law problems of implied revocation have been modified, affected, and changed by modern statutes in the various jurisdictions. To attempt to fully discuss all the modern statutes which have so modified, affected, and changed the common law is an almost overwhelming task, and we have contented ourselves with a very general classification of the same. These statutes have been divided into five general classes, *viz*: (1) those dealing with the effect of marriage; (2) those dealing with the effect of birth of issue; (3) those dealing with the effect of divorce; (4) those which expressly exclude any common-law doctrine of revocation; and (5) those which contain express saving clauses as to implied revocation. Of course class (1) and class (2) are the most important and also the most troublesome; for the provisions having to do with both are sometimes included in a single section of the statutes. An investigation has disclosed that there is not a single modern Anglo-American jurisdiction which has not in some manner or fashion altered by statute the doctrine of implied revocation as it existed at the common and ecclesiastical law. Some jurisdictions have reiterated in their statutes the two familiar

⁶² At p. 398.

⁶³ 1 Ves. and B. 390 at p. 398. See also *Holloway v. Clark*, 1 Phill. Eccl. 339; *Emerson v. Boville*, 11 Phill. Eccl. 343; and *Walker v. Welher*, 2 Curt. 854.

common-law rules of implied revocation, but even these states have made further provision in their statutes which alter the effect of the common-law rules thus reiterated.⁶⁴

1. *Statutes Dealing with the Effect of Marriage*

Some states have statutes which provide that the marriage of either a man or woman revokes a prior will. Included in the jurisdictions which have statutes of this type are England, Alaska, Colorado, Connecticut, Georgia, Illinois, Indiana, Kentucky, Massachusetts, Minnesota, Nevada, North Carolina, Oregon, Rhode Island, Virginia, Washington, and West Virginia.⁶⁵ In the following states the marriage of a woman revokes a prior will: Alabama, Arkansas, California, Idaho, New York, North Dakota, Oklahoma, Pennsylvania, and South Dakota.⁶⁶ In Hawaii and Nevada the statutes provide that the death of the husband does not revive the will.⁶⁷ In Ohio marriage of a woman does not revoke a will.⁶⁸ Some states have arrived at the result that marriage of a woman does not revoke a will on the basis of statutes which make it possible

⁶⁴ Alaska, Comp. L. (1913) sec. 565 (But see sec. 566); Arkansas, Dig. of Stats. (1921) sec. 10502 (Wife or child must survive testator); California, Civ. Code (1923) sec. 1298; Hawaii, Rev. L. (1925) sec. 3325; Idaho, Comp. Stats. (1919) sec. 7818; Minnesota, Mason's Stats. (1927) sec. 8745; Montana, Rev. Codes (1921) sec. 7000; N. York, McKinney's Consol. L., Decedent Estates, Vol. II. sec. 35 (Amended by Laws of 1919, Ch. 293 to give surviving spouse or issue intestate share. Hence will is not entirely revoked.); North Carolina, Consol. Stats. (1927) sec. 4134; N. Dakota, Comp. L. (1913) sec. 5666; Oklahoma, Rev. L. (1921) sec. 8364; Pennsylvania, West Pub. Co. Stats. (1920) sec. 8333 (Surviving spouse and issue get intestate share—no complete revocation.); and Utah, Comp. L. (1917) sec. 6334(1) (Applies only where testator was unmarried at time will was made).

⁶⁵ England, 1 Vict. c. 26 sec. 16 (Amended by 15 Geo. 5, c. 20—Law of Prop. Act 1925 p. 368 Chitty's Eng. Stats. sec. 177 so as not to apply to will made in contemplation of marriage.); Alaska, Comp. L. (1913) sec. 566; Colorado, Comp. L. (1921) sec. 5188; Connecticut, Gen. Stats. (1912) sec. 4946 (Uses only word, "testator" and masculine pronoun.); Georgia, Park's Ann. Civ. Code (1914) sec. 3925 (Unless provision to contrary); Illinois, Smith-Hurd Rev. Stats. (1927) Ch. 39, sec. 10; Indiana, Burn's Ann. Stats. (1926) sec. 3456; Kentucky, Carroll's Stats. (1922) sec. 4832; Massachusetts, Gen. L. (1920) Ch. 191, sec. 9; Minnesota, Mason's Stats. (1927) sec. 3742; Montana, Rev. Civil Code (1921) sec. 7001-7002 (With provisos in case of man,—unconditionally in case of a woman); Nevada, Rev. L. (1912) sec. 6211; North Carolina, Consol. Stats. (1927) sec. 4134; Oregon, Gen. L. (1920) sec. 10097 and 10098 repealed and amended respectively by Session L. of 1925, p. 106, Ch. 77; Rhode Island, Gen. L. (1923) sec. 4306; Virginia, Gen. L. (1924) sec. 5232; Washington, Rem. Comp. Stats. (1923) sec. 1399 (If wife or husband survive testator); and West Virginia, Barnes' Code (1923) sec. 6, p. 1642.

⁶⁶ Alabama, Code of 1928, sec. 10584; Arkansas, Dig. of Stats. (1921) sec. 10503; California, Civ. Code (1923) sec. 1300 (If husband survives); Idaho, Comp. Stats. (1919) sec. 7820; New York, McKinney's Consol. L. Vol. 2, sec. 36 under Dec. Estates; North Dakota, Comp. L. (1913) sec. 5668; Oklahoma, Comp. Stats. (1921) sec. 8365; Pennsylvania, Purd. Dig. (13th ed.) p. 5137, sec. 17 (Omitted in West Pub. Co. Penn. Stats. secs. 8332-33. Repealed by Session Acts 1917, p. 412); and South Dakota, Rev. Code (1919) sec. 630.

⁶⁷ Hawaii, Rev. L. (1925) sec. 3326 and Nevada, Rev. L. (1912) sec. 6212.

⁶⁸ Ohio, Gen. Code, sec. 10560.

for a married woman to make a will.⁶⁹ Arizona, California, Delaware, Georgia, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota, and Utah have statutes which provide that marriage of a man revokes his will if his wife survives him, but none of these statutes are absolute in nature.⁷⁰

Every state in the Union with the exception of New Jersey, has statutes like the Married Women's Act or specific statutes permitting a married woman to make a will.⁷¹ In New Jersey a woman can make a will only in respect to personalty.⁷² In some states the statutes providing that a will of a man or a woman is revoked by marriage, are absolute, that is, even a will made in contemplation of marriage is revoked by the marriage.⁷³ Some of these revocation statutes, however, contain exceptions, namely, (1) that a will made in the exercise of a power of appointment is not revoked by marriage if the heirs of the donee of the power would not take in case there was a failure to exercise the power of appointment; and (2) that the will is not revoked by the subsequent marriage, if the will was made in contemplation of marriage, or if the surviving spouse is provided for.⁷⁴ There are eight states which pro-

⁶⁹ *Chapman v. Dismar*, 14 App. D.C. 446; *In re Tuller*, 79 Ill. 99; *Hastings v. Day*, 151 Iowa, 39, 130 N.W. 134; *Emery, Appellant*, 81 Me. 275; *Noyes v. Southworth*, 55 Mich. 173 (But see *Durfee v. Risch*, 142 Mich. 504, 105 N.W. 1114); *Fellows v. Allen*, 60 N.H. 439; *Webb v. Jones*, 36 N.J. Eq. 163; and *Will of Ward*, 70 Wis. 251.

⁷⁰ Arizona, Rev. Stats. (1913) sec. 1208 (If wife survives and if no contrary intention appears in the will); California, Civ. Code (1923) sec. 1299 (If wife survives and unless other provision is made); Delaware, Rev. Code (1915) sec. 3263 (Unless other provision is made—gives her only intestate share); Georgia, Park's Ann. Civ. Code (1914) sec. 3923 (In which no provision is made in contemplation of such event); Idaho, Comp. Stats. (1919) sec. 7815 (If wife survives and unless other provision is made for her); Montana, Rev. Code (1921) sec. 7001 (Unless other provision is made); Nevada, Rev. L. (1912) sec. 6211 (Unless other provision is made); North Dakota, Comp. L. (1913) sec. 5667 (If wife survives and unless other provision is made); Oklahoma, Rev. L. (1921) sec. 8365 (Unless provided for by marriage contract or will); South Dakota, Rev. Code (1919) sec. 629 (If wife survives or unless other provision is made); and Utah, Comp. L. (1918) sec. 6834 (2) (If wife survives and unless other provision is made for her).

⁷¹ For typical examples see Alabama, Code (1928) sec. 8276 and sec. 209 of Ala. Const.; Arizona, Rev. Stats. (1913) sec. 1204; Arkansas, Art. 9, Sec. 7 of Const.; California, Civ. Code (1923) sec. 1273; Colorado, Comp. L. (1921) sec. 5184; Connecticut, Gen. Stats. (1918) sec. 4941; Delaware, Rev. Code (1915) Sec. 3240; Florida, Rev. Gen. Stats. (1927) sec. 5458; and Georgia, Park's Ann. Civ. Code (1914) sec. 3838.

⁷² Comp. Statutes of New Jersey (1910) p. 5362, sec. 3.

⁷³ Alaska, Comp. L. (1913) sec. 566; Colorado, Comp. L. (1921) sec. 5188; Illinois, Smith-Hurd, Rev. Stats. (1927) Ch. 39, sec. 10; Indiana, Burn's Ann. Stats. (1926) sec. 3456; Minnesota, Mason's Stats. (1927) sec. 8742; Montana, Rev. Civ. Code (1921) sec. 7001 (In case of woman only); Nevada, Rev. L. (1912) sec. 6211 (In case of woman only is it absolute); and Oregon, Gen. L. (1925) p. 106, ch. 77.

⁷⁴ Connecticut, Gen. Stats. (1918) sec. 4946 (If no provision is made in will for such contingency); Georgia, Park's Ann. Civ. Code (1914) sec. 3923 (If no provision is made in contemplation of such event); Kentucky, Carroll's Stats. (1922) sec. 4832 (Except will made in exercise of power of appointment when estate would not pass to heir, or next of kin); Massachusetts, Gen. L. (1920) ch. 191 sec. 9 (Unless made in contemplation of marriage or in

vide that the will of a woman is revoked by marriage, and of these eight California⁷⁵ is the only state which does not make such revocation provision absolute.⁷⁶

2. *Statutes Dealing with the Effect of the Birth of Issue*

In Delaware, Kansas, New Jersey, Ohio, and Texas birth of issue revokes a will unconditionally, if the testator was childless when he made the will.⁷⁷ Georgia and Louisiana have statutes which provide that birth of issue completely revokes a will regardless of whether the maker of the will was childless or not when he executed his testament.⁷⁸ Virginia and West Virginia have statutes which provide that if the testator was childless when he made the will, birth of issue revokes the will, conditioned, however, on the child living until he becomes twenty-one years of age or is married.⁷⁹ The statutes of Arizona, Indiana, and Mississippi contain provisions to the effect that whether the testator be childless or not at the time of making his will, birth of issue revokes the will, if the child live until he becomes twenty-one years of age or marries.⁸⁰ Most states have statutes providing that birth of issue does not revoke the will but entitles the after-born issue to an intestate share.⁸¹

exercise of power of appointment); Montana, Rev. Civ. Code (1921) sec. 7002 (In case of man only is there an "unless otherwise provided for" proviso.); Nevada, Rev. L. (1912) sec. 6211 (Unless otherwise provided for proviso applying to men only); North Carolina, Consol. Stats. (1927) sec. 4134 (Power of appointment proviso); Rhode Island, Gen. L. (1923) sec. 4306 (Power of appointment proviso); Virginia, Gen. L. (1924) sec. 5232 (Power of appointment proviso); Washington, Rem. Comp. Stats. (1923) sec. 1399 (If husband or wife shall be living at death of testator—and unless other provision is made for surviving spouse); and West Virginia, Barne's Code (1923) sec. 6, p. 1642 (Power of appointment proviso).

⁷⁵ California Civ. Code (1923) sec. 1300 (If husband survives the will is revoked, "... unless provision has been made for him by marriage contract, or unless he is provided for in the will or in such way mentioned therein as to show an intention not to make such provision.")

⁷⁶ Alabama, Code (1928) sec. 10584; Arkansas, Dig. of Stats. (1921) sec. 10503 ("Shall be deemed revoked"); Idaho, Comp. Stats (1919) sec. 7820 (Not revived by death of her husband); New York, McKinney's Consol. L. vol. 2, sec. 36 under Wills (Deemed revoked by her subsequent marriage); North Dakota, Comp. L. (1913) sec. 5668 (Not revived by death of her husband); Oklahoma, Comp. Stats. (1921) sec. 8365 (Not revived by death of her husband); and South Dakota, Rev. Code of 1919, sec. 630 (Not revived by death of her husband).

⁷⁷ Delaware, Rev. Code (1915) sec. 3253; Kansas, Rev. Stats. (1923) sec. 22-240; New Jersey, Comp. Stats. (1910) p. 5865, sec. 20; Ohio, Gen. Code sec. 10561; and Texas, Rev. Civ. Stats. (1928) art. 8293.

⁷⁸ Park's Ann. Civ. Code of Georgia (1914) sec. 3923 and Merrick's Rev. Civ. Code of La., (1924) art. 1705.

⁷⁹ Gen. Laws of Va., (1924) sec. 5242, and Barne's W.Va. Code, (1923) p. 1647, sec. 16.

⁸⁰ Rev. Stats. of Arizona, (1913) sec. 1216; Burn's Indiana Stats. sec. 3457 and 3458; and Hemingway's Ann. Miss. Code (1927) sec. 3568.

⁸¹ Alabama, Code (1928) sec. 10585; Alaska, Comp. L. (1913) sec. 569; Arkansas, Dig. of Stats. (1921) sec. 10506; California, Civ. Code (1923) sec. 1306; Colorado, Comp. L. (1921) sec. 5189 (Express provision that will should not be revoked entirely); Idaho, Comp. Stats.

3. *Statutes Dealing with the Effect of Divorce*

Minnesota and Washington are the only two states which have express statutes providing that divorce revokes a will.⁸²

4. *Statutes which Expressly Exclude any Common-Law Doctrine of Revocation*

England and several of our states have statutes expressly excluding the common-law doctrine of implied revocation.⁸³ Arkansas, Indiana, New Mexico, and Pennsylvania have revocation statutes which have been construed as excluding the common-law doctrine of implied revocation.⁸⁴ In these jurisdictions, then, problems of implied revocation are purely problems of statutory construction.

5. *Statutes which Contain Express Saving Clauses as to Implied Revocation*

Florida, Hawaii, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, Ohio, Vermont, Wisconsin, and Wyoming have revocation statutes which

(1919) sec. 7827; Illinois, Rev. Stats. (1927) ch. 39, sec. 10 (Express clause that it shall not revoke entire will); Iowa, Code (1924) sec. 11858; Kentucky, Carroll's Stats. (1922) sec. 4848; Maine, Rev. Stats. (1916) p. 1121, sec. 8 and 9; Massachusetts, Gen. L. (1920) ch. 191, sec. 20 and 21; Michigan, Comp. L. (1915) sec. 13790-13792; Minnesota, Mason's Stats. (1927) sec. 8744-8746; Missouri, Rev. Stats. (1919) sec. 514; Montana, Rev. Code (1921) sec. 7008 and 7010 (But see sec. 7000); Nevada, Rev. L. (1912) sec. 6215-6217; New Hampshire, Pub. L. (1926) p. 1202, sec. 10 and 11; New Jersey, Comp. Stats. (1910) p. 5865, sec. 21 (Applies only where testator had children when will was made.); New Mexico, Stats. (1915) sec. 5870; New York, McKinney's Consol. L. Dec. Estate, Vol. 2, sec. 26; North Carolina, Consol. Stats. (1927) sec. 4169; North Dakota, Comp. L. (1913) sec. 5674 and 5676; Ohio, Gen. Code (1921) sec. 10563-10564 (Applies only where testator had children living when will was made.); Oklahoma, Rev. L. (1921) sec. 8371 and 8373; Oregon, Olson's L. (1920) sec. 10101; Rhode Island, Gen. L. (1923) sec. 4313 and 4314; South Carolina, Code of L. (1922) sec. 5344; South Dakota, Rev. Code (1919) sec. 636; Tennessee, Thomp. Shan. Code (1917) sec. 3925 and 3926; Texas, Rev. Civ. Stats. (1928) Art. 8291; Utah, Comp. L. (1917) sec. 6340 (Applies only where testator was married when will was made.); Virginia, Gen. L. (1924) sec. 5243 (Applies only where testator has children when will is executed and then only if child live to be twenty-one or be married and have issue.); Washington, Rem. Comp. Stats. (1922) sec. 1402; West Virginia, Barne's Code (1923) sec. 17, p. 1647 (Same as Virginia section above); and Wisconsin, Stats. (1927) sec. 238.10 and 238.12.

⁸² Minnesota, Mason's Stats. (1927) sec. 8742 and Washington, Rem. Comp. Stats. (1922) sec. 1399.

⁸³ England, 1 Vict. c. 26, sec. 19; Alabama, Code (1928) sec. 10600; California, Civ. Code of 1923, sec. 1970; District of Columbia, Code of L. (1924) sec. 1626; (Any former law or usage to the contrary notwithstanding); Louisiana, Merrick's Rev. Civ. Code (1924) Art. 1692; Montana, Rev. Codes (1921) sec. 6995 (But Code provides for revocation under common-law situations); Rhode Island Gen. L. (1923) sec. 4307; South Dakota, Rev. Code (1919) sec. 623; and Utah, Comp. L. (1917) sec. 6329.

⁸⁴ *Davis v. Whitaker*, 38 Ark. 435; *Wolf v. Wolf*, 73 Ind. App. 221, 127 N.E. 152; *Teapfer v. Keaufer*, 12 N.M. 372, 78 Pac. 51; *Dixon's Appeal*, 55 Pa. St. 424; and *In re Jones*, 211 Pa. St. 364, 60 Atl. 915.

contain express saving clauses as to implied revocation.⁸⁵ Maryland, Mississippi, and New Mexico have revocation statutes which have been construed as not being exclusive of the common-law doctrine.⁸⁶ It is these jurisdictions which offer the most fruitful sources for the present day problems of implied revocation to be discussed in the next section.

E. PROBLEMS OF IMPLIED REVOCATION BY CHANGE IN DOMESTIC RELATIONS WHICH ARISE UNDER THE STATUTES ABOVE MENTIONED

1. Those Arising under Statutes Affecting Marriage

a. What is the effect of statutes making it possible for a married woman to make a will on the rule that the will of a *feme sole* is revoked by marriage? The common-law rule, that the marriage of a *feme sole* revoked her will, rested on theory that a will is ambulatory during the lifetime of the maker and can be revoked at any time, and that the will is always subject to the testator's control. The marriage of a woman according to the common-law rule, did away with this control over the will, and therefore revoked it.⁸⁷ The majority of courts in the United States hold that when a statute gives a married woman power to make a will, the reason for the common-law rule no longer exists.⁸⁸ The attitude of those courts adhering to this view can best be summed up as follows: "To hold that marriage of itself revoked a former will of the wife, under the circumstances here presented . . . when the next day

⁸⁵ Florida, Rev. Gen. Stats. (1927) sec. 5461 (Applies to realty only); Hawaii, Rev. L. (1925) sec. 3323; Kansas, Rev. Stats. (1923) sec. 22-241; Maine, Rev. Stats. (1916) p. 1120, sec. 3; Massachusetts, Gen. L. (1920) ch. 191, sec. 8; Michigan, Comp. L. (1915) sec. 11,825; Minnesota, Mason's Stats. (1927) sec. 8741; Nebraska, Comp. Stats. (1922) sec. 1250; Nevada, Rev. L. (1912) sec. 6207; New Hampshire, Pub. L. (1926) p. 1202, sec. 14; Ohio, Gen. Code sec. 10555; Vermont, Gen. L. (1917) sec. 3212; Wisconsin, Stats. (1927) sec. 238.14; and Wyoming, Comp. St. (1920) sec. 6671.

⁸⁶ *King v. McComas*, 126 Md. 392; *Redwood v. Howison*, 129 Md. 589; *Caine v. Barnwell*, 120 Miss. 209, 82 So. 65; and *Teapler v. Kaeufer*, 12 N.M. 372, 78 Pac. 51.

⁸⁷ *Hodsdon v. Lloyd*, 2 T.R. 695.

⁸⁸ *Chapman v. Dismar*, 14 App. D.C. 446; *Tuller's Will*, 79 Ill. 99, 22 Am. Rep. 164; *Hastings v. Day*, 151 Iowa, 39, 130 N.W. 134; *Emery's Appeal*, 81 Me. 275, 17 Atl. 68; *Roane v. Hollingshead*, 76 Md. 369, 25 Atl. 307; *Noyes v. Southworth*, 55 Mich. 173, 20 N.W. 891; *Kelly v. Stevenson*, 85 Minn. 247, 88 N.W. 739; *Kelly v. Alred*, 65 Miss. 495, 4 So. 551; *Lee v. Blewett*, 116 Miss. 341, 77 So. 147; *Fellows v. Allen*, 60 N.H. 439, 3 Atl. 636; *Webb v. Jones*, 36 N.J. Eq. 163; *Morton v. Onion*, 45 Vt. 145; *Ward's Will*, 70 Wis. 251, 35 N.W. 731; 1 Underhill on WILLS 321, sec. 235; and 1 Page on WILLS (2d ed.) sec. 482, p. 780.

after the marriage she had power to reinstate the same writing as her last will and testament would seem to be absurd."⁸⁹

A rather substantial minority persists, however, in saying that marriage of a woman works a revocation of her prior will in spite of the fact that in practically all jurisdictions, a married woman can now make and therefore also alter a will.⁹⁰ It should be borne in mind on the other hand, that statutes giving married women complete control over their property do not abrogate statutes which provide that the will of a woman is revoked by her subsequent marriage.⁹¹

b. Do statutes which make the wife an heir of her husband alter the common-law rule that marriage of a man will not alone revoke his will? The issue involved under this problem is whether the common-law rule that the marriage of a man would not revoke his will was an arbitrary rule; or was the true rule one which provided that marriage would not revoke the will if the wife did not profit by such revocation. The authorities on this question present a conflict of views and a reconciliation of the decisions on this matter is difficult if not altogether impossible. In the case of *Brown v. Scherer*⁹² the court said: "The English law rests on the firm foundation that the birth of an heir who can inherit lands shall be held operative to destroy a will, because it is not to be conceived that the testator has devised his estate in view of such extraordinary alteration in his condition. The same principle and the same rule can be urged with like force in our own legislation. . . . it is a strained conception to assume that a man who has made a will while unmarried has made it in contemplation of his assumption of the marriage relation. There is no force in the suggestion that, because a woman becomes

⁸⁹ *Ward's Will*, 70 Wis. 251, 35 N.W. 731.

⁹⁰ *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286 (obiter); *Vanek v. Vanek*, 104 Kan. 624, 180 Pac. 240; *Swan v. Hammond*, 138 Mass. 45; *Blodgett v. Moore*, 141 Mass. 75, 5 N.E. 470; and *In re Booth*, 40 Ore. 154, 61 Pac. 1135, 66 Pac. 710.

⁹¹ *McAnulty v. McAnulty*, 120 Ill. 26, 11 N.E. 397; *Ellis v. Darden*, 86 Ga. 368, 12 S.E. 652; *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255; *Blodgett v. Moore*, 141 Mass. 75, 5 N.E. 470; *Nutt v. Norton*, 142 Mass. 243, 7 N.E. 720; *Loomis v. Loomis*, 51 Barb. (N.Y.) 257; *Lathrop v. Dunlop*, 4 Hun. (N.Y.) 213; *Brown v. Clark*, 77 N.Y. 369; *In re Kaufman*, 131 N.Y. 620, 30 N.E. 242; *In re Booth's Will*, 40 Ore. 154, 61 Pac. 1135; *In re Franzen's Will*, 26 Pa. St. 202; *In re Craft's Estate*, 164 Pa. 520, 30 Atl. 493; and *Müller v. Phillips*, 9 R.I. 141.

⁹² 5 Colo. App. 255, 38 Pac. 427; and also see discussion, *supra*.

an heir by virtue of the statute, she does not come within the beneficent provisions of the rule as declared at the common law. It was by the law only that the male heir succeeded to the testator's lands and took his inheritance. That the wife has become an heir by legislation forms no lesser reason for the application of the rule." This seems to be the logical and better view, and is supported by considerable authority,⁹³ although the reasoning in some of the cases is weak.⁹⁴

The contrary view is best set forth in the case of *Rulett v. Carey*:⁹⁵ "The main reason why, at common law, marriage and the birth of issue were deemed such a change in the conditions or circumstances of the husband, as would work an implied revocation of his prior will, was, that other-wise his issue would be wholly unprovided for, a thing which was not to be supposed to have been in the contemplation of the testator; whereas under our statute, and we assume without special examination under the statutes of those states in which the decisions cited were rendered, even if the will stand, very liberal provision has been made for the widow independently of any act of the husband. . . . The mere fact that she now, under the statute, in certain contingencies, inherits more from her husband is not sufficient to warrant us in holding that the common-law rule has been so changed that marriage alone is such a change of condition or circumstance as will work an implied revocation of the prior will of the husband." This attitude is also supported by considerable authority.⁹⁶

c. Does a common-law marriage revoke a will? This question must be answered in the affirmative, providing, however, that there is a statute to the effect that a will is revoked by a subsequent marriage of the testator, and further that common-law marriages are recognized as valid marriages in

⁹³ *Colcord v. Conroy*, 40 Fla. 97, 23 So. 561; *Morgan v. Ireland*, 1 Idaho, 786; *Tyler v. Tyler*, 19 Ill. 151; *American Board v. Nelson*, 72 Ill. 564; *Duryea v. Duryea*, 85 Ill. 41; *In re Teopler*, 12 N.M. 372, 78 Pac. 53; and Schouler on WILLS, sec. 424. See also *In re Tuller*, 79 Ill. 99, 22 Am. Rep. 164.

⁹⁴ See as a typical example *Tyler v. Tyler*, 19 Ill. 151.

⁹⁵ 66 Minn. 338, 69 N.W. 31.

⁹⁶ *Goodsell's Appeal*, 55 Conn. 171, 10 Atl. 557; *Herzog v. Trust Co.*, 67 Fla. 54, 64 So. 426; *Vanek v. Vanek*, 104 Kan. 624, 180 Pac. 240; *Hoy v. Hoy*, 93 Miss. 732, 48 So. 903; *Hoitt v. Hoitt*, 63 N.H. 475, 3 Atl. 604; *Mundy v. Mundy*, 15 Ohio C.C. 155; and *In re Adler's Estate*, 52 Wash. 539, 100 Pac. 1019. See also *Ward's Will*, 70 Wis. 251, 35 N.W. 731.

the particular jurisdiction. In the case of *In re Mattcote's Estate*,⁹⁷ a divorced husband cohabited with his former wife until his death. The court held that his will made prior to cohabitation was revoked thereby, because a common-law marriage had existed between the couple and that the statute providing that a will is revoked by a subsequent marriage of the testator was applicable to the situation involved. In jurisdictions like Wisconsin which frown upon common-law marriages and hold them void, the above result could not be reached even though statutory marriage revoked a will.

2. Problems Arising under Statutes Affecting Birth of Issue

a. Does birth of an illegitimate child revoke a will? Illegitimate children come within the scope of statutes relating to revocation of wills made by persons who subsequently have issue, if such illegitimate children have been given the right of inheritance.⁹⁸ Under state laws providing that illegitimate children cannot inherit, there is of course no good reason for revoking the will.⁹⁹

In the case of *McCulloch's Appeal*¹⁰⁰ the illegitimate child was born before the will was made, and its legitimation took place subsequent to the execution of the will. This was held not to be a constructive birth which would revoke the prior will. In the case of *Succession of Caballero v. Executor*,¹⁰¹ it was held that the legitimation by marriage subsequent to the making of a will, of a child born previous to the making of the will, had the effect of annulling the will. The Civil Code of Louisiana provides: "Children legitimated by a subsequent marriage have the same rights as if they were born during marriage."¹⁰² The court on the basis of the peculiar wording of this Louisiana legitimation statute held that the children in

⁹⁷ 59 Colo. 566, 151 Pac. 448.

⁹⁸ *Milburn v. Milburn*, 60 Iowa, 411, 14 N.W. 204. In this case it was held that the birth of an illegitimate child to the testator after the making of the will, revoked the will, where there was a general and notorious recognition by the testator of the child as his, and a statute provided that under such circumstances illegitimate children should inherit from their father. *Hastings v. Rathbone*, 194 Iowa, 177, 188 N.W. 960. See also *Kent v. Borker*, 2 Gray (Mass.) 535; and *Bunce v. Bunce*, 27 Abb. 61, 14 N.Y. Supp. 659.

⁹⁹ *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41.

¹⁰⁰ 13 Pa. St. 247, 6 Alt. 253. See also *In re Patterson*, 282 Pa. St. 396, 128 Atl. 100.

¹⁰¹ 24 La. Ann. 573.

¹⁰² Merrick's Rev. Civ. Code of La. (1925) art. 199.

question when they were legitimated after the making of the will were constructively reborn so as to work a revocation of the testament under a section of the Code providing that: "The testament falls by the birth of legitimate children of the testator, posterior to its date."¹⁰³

It would seem that the cases of *Mc Culloch's Appeal* and *Succession of Caballero v. Executor*, *supra*, are in irreconcilable conflict, for the legitimation and birth of issue statutes are in all vital respects similar.¹⁰⁴

Porto Rico, by statute, has adopted a novel way of disposing of this problem and in the case of *Olivieri v. Olivieri*¹⁰⁵ the court held that under the Civil Code a parent could not dispose of more than one-third of his estate by will as against legitimate children, but could dispose of two-thirds of his property if all his issue were illegitimate.

It would seem that legislatures would do well to eliminate this problem by express statutory provision making it possible for legitimation by either marriage or recognition to operate in the same manner as birth in regard to a prior will.

b. Does adoption of a child revoke a will? There is a conflict of authority on this question due largely to the difference in the wording of the various adoption statutes.¹⁰⁶ In many jurisdictions where an adopted child is entitled to the same rights of inheritance as a natural child, adoption of such child revokes a will just as the subsequent birth of a natural child would.¹⁰⁷ There is, however, authority to the contrary.¹⁰⁸ The various states might well follow the lead of Connecticut in respect to this problem and eliminate all difficulty by ex-

¹⁰³ Merrick's Rev. Civ. Code of La. (1925) art. 1705.

¹⁰⁴ Penn. Stats. (1920) (West Pub. Co.) sec. 8382 and 8383. See notes 102 and 103 for Louisiana Statutes.

¹⁰⁵ 5 Fed. 607. (Porto Rico).

¹⁰⁶ *In re Rendell's Estate*, 244 Mich. 197, 221 N.W. 116.

¹⁰⁷ *Flannigan v. Howard*, 200 Ill. 396, 65 N.E. 782; *Hilpire v. Claude*, 109 Iowa, 159, 80 N.W. 332; *Dreuer v. Schrick*, 105 Kan. 495, 185 Pac. 30; *In re Rendell's Estate*, 244 Mich. 197, 221 N.W. 116; *Surman v. Surman*, 21 Ohio App. 434, 153 N.E. 873; *Glascott v. Bragg*, 111 Wis. 605, 87 N.W. 853; and *Sandon v. Sandon*, 123 Wis. 603, 101 N.W. 1089.

¹⁰⁸ *In re Comassi*, 107 Cal. 1, 40 Pac. 15; *Davis v. Fogle*, 124 Ind. 14, 23 N.E. 860; *Succession of McRachen*, 162 La. 445, 110 So. 645; *Sorrell v. Sorrell*, 193 N.C. 439, 137 S.E. 306; *Goldstein v. Hammell*, 236 Pa. 305, 84 Atl. 772; *In re Boyd's Estate*, 270 Pa. 504, 123 Atl. 691; and *Evans v. Evans*, (Tex. Civ. App.), 186 S.W. 815.

press statutory provision to the effect that adoption of a child revokes a will.¹⁰⁹

3. *Revocation by Divorce of Testator*

Those courts which have held that divorce plus a property settlement can work a revocation had to hold that the doctrine of implied revocation by change in domestic relations is broader than its well-defined common-law applications.¹¹⁰ It does not follow, however, that those courts which have arrived at the opposite result have answered this problem of the elasticity of the doctrine in the opposite way, for most of these cases were decided on the ground that the common-law doctrine of implied revocation had been abrogated by statute in the particular jurisdiction.¹¹¹

It has been pointed out previously that the early doctrine of the ecclesiastical courts was that marriage plus birth of issue in case of a male testator created a mere rebuttable presumption that the testator intended to revoke his will; but that it is today universally agreed that the presumption created by these changes is a conclusive one—a positive irrebuttable rule of law.¹¹² Therefore, once a court concedes that divorce plus a property settlement are in a particular case sufficient to work a revocation of a prior will, it is bound to say that this change in circumstances will constitute revocation in all cases.¹¹³ Of course, only those states having statutes which are not exclusive of the common law can possibly adopt such a rule.¹¹⁴ To decide whether it is more advisable to hold that a divorce revokes a prior will as to the other spouse or that it

¹⁰⁹ Session Laws of Conn., (1927) Ch. 237, p. 4296 amends sec. 4946 of Gen. Stats. of Conn. (1918) to read: "... or a child shall be born to testator or a minor child shall be legally adopted by him."

¹¹⁰ *Lansing v. Haynes*, 95 Mich. 16, 54 N.W. 699; *Wirth v. Wirth*, 149 Mich. 687, 113 N.W. 306; *In re McCraw's Estate*, 228 Mich. 1, 199 N.W. 686; *Donaldson v. Hall*, 106 Minn. 502, 119 N.W. 686; *Barilett v. Lahr*, 108 Neb. 681, 189 N.W. 390, 190 N.W. 869; *In re Martin's Estate*, 109 Neb. 289, 190 N.W. 872; and *Will of Battis*, 143 Wis. 234, 126 N.W. 9.

¹¹¹ *In re Patterson's Estate*, 64 Cal. App. 643, 222 Pac. 374; *Succession of Cunningham*, 142 La. 701, 77 So. 506; *Murphy v. Markis*, 98 N.J. Eq. 153, 130 Atl. 840; *Re Jones*, 211 Pa. 364, 60 Atl. 915; and *In re Nenaber's Estate*, —S.D.—, 225 N.W. 719.

¹¹² See notes 31, 32, and 38, *supra*.

¹¹³ *Will of Battis*, 143 Wis. 234, 126 N.W. 9; *Wirth v. Wirth*, 149 Mich. 687, 115 N.W. 699; and *In re McGraw's Estate*, 228 Mich. 1, 199 N.W. 681.

¹¹⁴ *In re Patterson's Estate*, 64 Cal. App. 643, 222 Pac. 374; *Succession of Cunningham*, 142 La. 701, 77 So. 506; *Murphy v. Markis*, 98 N.J. Eq. 153, 130 Atl. 840; *Re Jones*, 211 Pa. 364, 60 Atl. 915; and *In re Nenaber's Estate*, —S.D.—, 225 N.W. 719.

does not so revoke, is, of course, a mere guessing game, but this much is certain, that the various states would do well to follow the lead of Washington and Minnesota and establish some definite statutory rule providing either that divorce does revoke or that it does not revoke a prior will.¹¹⁵ A full discussion of implied revocation by divorce will be found in 5 WISCONSIN LAW REVIEW, 377.

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J. H. BEUSCHER.

¹¹⁵ See note 82, *supra*.